No. 83-1720

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

RALPH KORN and ALEX SIEGAL,

Petitioners,

vs.

RABBINICAL COUNCIL OF CALIFORNIA, an unincorporated association, MARVIN SUGARMAN, PINCHOSE GRUMAN, REUBEN HUTTLER, YALE BUTLER, MELVIN TEITELBAUM and SOLOMON SPITZ,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

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SUMMARY OF THE OPPOSITION

There is no jurisdiction under U.S.C. Sec. 1257(3) because no federal right is being pressed here. Instead, plaintiffs merely seek to press rights they claim to have under California law. The decisions of the California courts were based on adequate and independent state law grounds pertaining to ecclesiastical questions. The case never presented a federal question in the first place. Although there was a claim under the Sherman Act, the State courts properly held that they had no jurisdiction of it, and decided nothing in connection with it. The antitrust issues which were decided arose only under California's Cartwright Act.

All the antitrust claims, and all the potential Constitutional issues, were mooted when the only parties who were interested in them failed to take any

appeal from the rulings of the trial court. The case never presented any issues of wide importance. The ecclesiastical questions doctrine is old and settled, and this case merely presents a routine application of it. For this reason, even if jurisdiction otherwise existed to grant certiorari, this Court should decline to grant it.

THE PROCEEDINGS BELOW

This case arose when the Rabbinical Council of California, and various of its member rabbis, declined to certify the products of Acme Meat Company as being kosher. The original complaint was brought by three classes of plaintiffs: the Acme Meat Company, whose Kosher Bosher division was alleged to have sustained antitrust-type damages; Ralph Korn and Alex Siegal [sic], who were salesmen for Acme; and the United Orthodox Rabbinate of Greater Los Angeles ("UORGLA"), which certified Acme's

meat as kosher, but whose certification was not taken seriously by the kosher-concerned public. The complaint sought antitrust relief under the Sherman Act and the Cartwright Act, which is California's antitrust statute. It also sought relief for various torts alleged, none of which are claimed to have had any federal character.

The trial court sustained a demurrer, largely on the grounds that all aspects of the case turned on an ecclesiastical question, namely, whether the meat in question was actually kosher. The ecclesiastical question doctrine is a principle of California constitutional law; and the demurrer was so argued to the trial court. The trial court offered the plaintiffs leave to amend, but they expressly declined it, because they were eager to take their supposed constitutional issues up, and any

further proceedings in the trial court would have slowed down the appellate process. [See the discussion of this point in the Appellate opinion, Appendix 1 to the Petition, at A-10.]

When the appeal was taken, the only parties who took it were Korn and Siegal: neither Acme Meat Company nor UORGLA, the only parties with colorable antitrust claims, participated in the appeal. As far as this Court knows, Acme is now out of the kosher meat business. (In fact, petitioners disclosed to the Court of Appeal, at page 6 of their opening brief, that Acme had gone out of the kosher meat business during the pendency of the appeal.) It was partly for this reason that the Court of Appeal agreed [Opinion, Appendix 1 to Petition, at A-11] that no antitrust issues were presented at the appellate level.

ARGUMENT

I. THERE IS NO FEDERAL QUESTION IN THE CASE.

The case was decided entirely on principles of California state law, and no federal question was ever presented or decided. The petitioners themselves do not base their petition on their Sherman Act claims: even they acknowledge that the California courts were correct when they declined to take jurisdiction of those claims.

The petition is not really clear as to what federal question is alleged to be presented, who presented it in the courts below, or how it was presented there. But if we read the petition generously, the gist of its argument is the notion that the California courts felt themselves bound, under compulsion of the First Amendment to the United States Constitution, to decline

to hear plaintiffs' California antitrust claim in this case, because the case involves kosher meat. The petitioners want this Court to step into the picture to announce to the courts of California that the First Amendment does not compel them to reject state-law antitrust claims merely because the claims revolve around kosher meat.

But the fact of the matter is that the California courts already know this, and the opinion of the Court of Appeal makes this fact clear. Indeed, the opinion contains a formal recognition of the fact that state courts can and do decide cases involving kosher meat: at Appendix 1, page A-8, the Court of Appeal lists the many state cases in which such claims have been entertained. So there can be no question that the California courts did not feel themselves compelled by the Constitution,

but rather chose to apply their own ecclesiastical questions doctrine and to abstain from deciding this case.

The ecclesiastical question doctrine has existed in California for years, and the opinion of the Court of Appeal begins from citation of the most recent California case, Wilson v. Hinkle (1977) 67 Cal.App.3d 506 [See Appendix 1 to Petition, at A-6]. That the doctrine is well established in California law appears not only from that case but also from these earlier ones:

> Permanent Committee of Missions of the Pacific Synod of the Cumberland Church in the United States v. Pacific Synod of the Presbyterian Church, U.S.A (1909) 157 Cal. 105;
>
> Maxwell v. Brougher (1950) 99 Cal. App.2d 824; and
>
> Owen v. Board of Directors of Rosicrucian Fellowship (1959) 173 Cal.App.2d 112.

The doctrine is not properly viewed as establishing either a "right" or a "privi-

lege" or an "immunity" in any person. Instead, it is one of the many rules that courts are free to make for themselves, under which they abstain from deciding certain kinds of cases. These rules have been made over the centuries for a variety of reasons, some having to do with deep-rooted principles, and other having to do merely with division of business between the King's courts and the ecclesiastical ones. When the defendants invoked this doctrine, they did not assert a "right", "privilege", or "immunity": they merely reminded the California courts of their own doctrine. But even if the demurrer were to be viewed as the assertion of some right, it was a right asserted under the law of California, and not under the First Amendment.

It is the rule in this Court that the record must make it clear that a federal

question, as distinct from a state law question, was presented below. Where both state and federal constitutional laws are relied on, this Court will assume that it was the state constitutional grounds which supported the state court decision. New York Central & H. R. Co. v. New York, 186 U.S. 269, 273.

In this case, the record makes it clear that the opinion below stood on firm principles of California law. The appellate opinion begins with Wilson v. Hinkle, supra, and enunciates the California doctrine. The fact that California constitutional analysis parallels a similar analysis found in the federal cases, does not mean that a federal Constitutional question arises every time California interprets its own laws. Of course, where the decision below stands on adequate state grounds, this Court will not review the judgment.

Fox Film v. Muller, 296 U.S. 207.

II. THE CASE IS MOOT

The gist of the case is the antitrust damage alleged to have been suffered by Acme Meat. But petitioners, appellants below, made the following statements in their opening brief:

> As a result of the respondents [sic] conduct in preventing appellants from marketing its products ACME had to shut down its Kosher operations during the pendency of this appeal and the appellants were totally denied of their livelihoods.
>
> Opening Brief, page 6, lines 6-8

It is thus clear that as to Acme Meat, the only real party in interest in the antitrust claims, the case is moot.

III. PETITIONERS ARE NOT THE REAL PARTIES IN INTEREST

It is settled law that neither officers, employees nor shareholders of corporations which suffer antitrust injuries can bring antitrust actions in their own names. This is a point of law on which both the California and federal cases are quite clear, and in accord.

Kaufman v. The Dreyfus Fund, 434 F.2d 727

Ash v. IBM Corporation, 353 F.2d 491, cert. den'd 384 U.S. 927

Reibert v. Atlantic-Richfield Corp., 471 F.2d 727, cert. den'd 411 U.S. 398

Krigbaum v. Sbarbaro, 23 Cal.App. 427

A B C Distributing Co. v. Distillers Distributing Corp., 154 Cal. App.2d 175

Witt v. Union Oil, 99 Cal.App.3d 435

In considering the Petition for Certiorari, this Court should abide by the rule that the petitioner must show that he, and not some third party, is the real party in interest.

After all, a person cannot invoke the jurisdiction of this court to vindicate the right of a third party. Liberty Warehouse v. Burley Tobacco Growers' Co-op, 276 U.S. 71, 88. But Petitioners here are seeking to vindicate the rights of persons who chose not to become parties to the appeal. This Court should not grant their petition.

IV. EVEN IF THERE WERE GROUNDS OF JURISDICTION, THIS COURT SHOULD DECLINE TO EXERCISE IT

Because Acme Meat did not appeal, the case is effectively moot: the parties who might have had a stake in it no longer do. This is one reason this Court should not grant the petition.

But there is another reason: this case does not present any questions of broad importance. It is already well settled law that the courts will enforce laws affecting kashrut in cases in which the central question is non-ecclesias-

tical [Hygrade Provision Co. v. Sherman, 266 US 497, repeatedly cited in the Petition]. But in cases where the central question is ecclesiastical, courts will not get involved [United Kosher Butcher Association v. Associated Syunagogues of Greater Boston, Inc., 349 Mass. 595, cited in the opinion]. These are the broad principles, which are already well settled, and familiar. This case is merely a routine application of settled principles.

CONCLUSION

The case is not a proper one for the exercise of certiorari jurisdiction under the meaning of 28 U.S.C. 1257(3), because there is no federal question presented in the case, and if there were one, it is not properly preserved for this Court now. The decision of the courts below rests on adequate state grounds, and the parties who petition, and who appealed, never had standing to press the antitrust claims in the first place. As to the real parties in

interest, the case is moot.

Even if there were jurisdiction, this is not a good case in which to exercise it, because the case is moot; and all the legal issues involved are well settled and quite familiar.

For all these reasons, certiorari should be denied.

Respectfully submitted,

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